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IN THE SUPREME COURT FOR THE STATE OF IDAHO

THE CITY OF MERIDIAN, an Idaho
Municipal Corporation,

Plaintiff/Appellant,

v.

PETRA, INCORPORATED, an Idaho
Corporation,

Defendant/Respondent.

Supreme Court Docket No. 39006-2011

Ada County Case No. CV OC 09-7257

**APPELLANT'S SECOND AUGMENTED BRIEF ON APPEAL RE: ILLEGALITY OF
THE CONTRACT**

Appeal from the Fourth Judicial District, Ada County, Idaho

HONORABLE RONALD WILPER, Presiding

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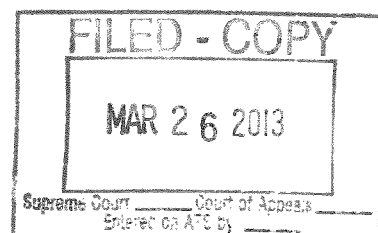


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Docket No. 39006-2011

Case No. CV OC 09-7257

**APPELLANT'S SECOND
AUGMENTED BRIEF ON APPEAL
RE: ILLEGALITY OF THE
CONTRACT**

Comes now the City of Meridian ("City"), which hereby submits the following
Augmented Brief on Appeal re: Illegality of Contract.

ARGUMENT

During the Oral Argument of this pending matter, the Justices of the Supreme Court, *sua sponte*, raised the issue of illegality of contract in relationship to the procurement of payment and performance bonds for the Meridian City Hall ("MCH") Project. The issue of whether a Licensed Construction Manager's failure to obtain the payment and performance bonds renders such contract illegal has no reported precedent.

On or about March 6, 2013 the Respondent Petra Incorporated ("Petra") submitted its Respondent's Brief on Appeal Regarding the Legality of the Construction Management Agreement ("the Respondent's Brief").

In the Respondent's Brief, Petra asserts that the City was solely responsible for the language of the Construction Management Agreement ("CMA") relating to the provision of the Construction Manager's duty for the provision of performance and payment bonds.¹ The e-mail documents evidencing Petra's in-house counsel's request for the language of Section 10.3 were not presented to the District Court at trial, as the issue of illegality and any corresponding fault of the parties was not directly litigated.²

Petra's assertion regarding 'written notification' from Bennett as to the need for the City to make some type of decision with respect to performance and payment bonds, is *not* supported by the documents produced by Petra during discovery in this matter.³ Simply put, there is no "writing" as claimed by Mr. Bennett in his testimony, and none was produced either in discovery or at trial.

Mr. Bennett's testimony evidences Petra's failures in its duties. Not only did Petra fail to provide payment and performance bonds as required by the Construction Manager Statute,⁴ but Petra failed to advise the City that Petra was required by statute to provide the statutorily mandated performance and payment bonds. As important, Mr. Bennett testified pre-trial in his deposition that Petra never gave the City any advice regarding the Construction Managers' performance and payment bond duties as contained in I.C. §54-4512.⁵ Mr. Bennett testified at deposition:

Q: Are you aware of the Idaho statute that says all construction managers shall provide a performance bond for the full value of their work?

¹ See, Respondent's Brief on Appeal Regarding the Legality of the Construction Management Agreement, p. 14.

² See, Affidavit of Kim J. Trout dated March 20, 2013; The documents attached to the Affidavit were not part of the original Record on Appeal, but were a part of the documents produced in discovery by the City. They were not originally presented to the District Court as the issue of illegality was not at issue before the District Court. The City seeks to Supplement the Record on Appeal with the relevant documents to allow the Supreme Court to be fully informed on the issues.

³ See, Affidavit of Kim J. Trout dated March 20, 2013.

⁴ See, I.C. §54-4512.

⁵ See, R. 005248, 005249.

A: I am.

Q: And did you advise the City in any fashion that the statute was not mandatory?

A: No.

Q: Did you give them any advice with respect to the statute?

A: Did we give them any advice with respect to the statute?

Q: Yes, sir.

A: No.

Q: Did you tell them that you could not perform your work without the posting of a performance bond pursuant to the statute?

A: No. I didn't ask them that.

Q: Did you tell them that?

A: No, I did not.

Q: Did anyone at Petra tell the City that the performance of the work by Petra as a construction manager could not occur without the posting of a performance and payment bond?

A: That's not true.

Q: Well, do you think the statute says something else?

A: No.

Q: Then why do you say that's not true?

A: Because we talked to the City about the bond, and the bond would have been provided for the amount of our contract. And in lieu of that, they asked for errors and omission insurance for \$2 million, which was more than the contract instead.

Q: Well, my question isn't that.

A: Okay.

Q: I'll try and make it very clear. Did Petra advise the City that it could not comply with the laws of the State of Idaho if it did not post a performance and payment bond as required by the statute?

A: Did Petra advise them?

Q: Yes.

A: I don't recall.

R5248 – R5249

Bennett's assertion that some kind of in lieu is simply not borne out by the CMA. Both errors and omissions insurance coverage *and* performance and payment bond provisions were contained in the agreement, and there was no other agreement as to "in lieu". The CMA was never modified in writing and signed by the parties as contractually

required by the CMA.⁶ Thus, Bennett/Petra's suggestion of an 'in lieu' agreement is simply false.

Simply stated, Bennett, as Petra's licensed Construction Manager held a fiduciary duty of "trust and confidence" in representing the City and advising the City during the course of Petra's work as the Construction Manager. Contrary to Petra's 'partial quote' from the Bennett deposition,⁷ the full quote of Bennett's testimony demonstrates that Petra failed in its role as the licensed Construction Manager to discharge its duties by proper advice to the City, and further failed to obtain the required bonds.

The City placed its faith in professional outside legal counsel, and in Petra, to provide it with the correct advice for the project. Petra's in-house legal counsel sought the inclusion of the conditional language of Section 10.3. Bennett, as the licensed Construction Manager, had a professional duty to comply with the law. Petra's assertion that "[I]t was the City's counsel that called for the Errors and Omissions Insurance Policy" seeks, erroneously, to divert this Court's attention from Petra's unequivocal statutory duty to provide the payment and performance bonds.

No one — not the City, not the Public Works Contractors State License Board, not this Court — could relieve Petra of its statutory obligation. Only Petra's choice not to perform the CM work would have relieved it of its statutory duty: a choice Petra did not make. Petra's "red herring" argument highlights Petra's attempt to shift its statutorily mandated duty to the City. This Petra may not do.

No one but Petra had the responsibility nor the authority to discharge Petra's statutory duties. Likewise, no one but Petra is responsible for Petra's acts, or failures to act by failing to obtain the performance and payment bonds.

⁶ See, Ex. 2003, §10.17, p.26.

⁷ See, Respondent's Brief on Appeal Regarding the Legality of the Construction Management Agreement, p. 14.

If this Court engages in a balancing test of any type, Petra held the duty, failed to discharge the duty, and is responsible for its failures and fully responsible for any and all of the ramifications of its own failures.

CONCLUSION

If public policy, and the public interests are to be served, the City respectfully requests the Supreme Court consider the foregoing in its deliberations on this matter.

RESPECTFULLY SUBMITTED this 26th day of March, 2013.

TROUT LAW, PLLC

A handwritten signature in black ink, appearing to be 'KJ Trout', written over a horizontal line.

Kim J. Trout
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on March 26th, 2013 a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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